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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Urban Title, LLC

File: B-311437.3

Date: January 7, 2009

Andrew J. Mohr, Esq., John J. O'Brien, Esq., and Catherine K. Kroll, Esq.,
Cohen Mohr LLP, for the protester.
Scott L. Luna, Esq., for Luna & Luna, LLP, an intervenor.
Gabriel Lopez, Esq., and Dorothy C. Crow-Willard, Esq., Department of Housing and
Urban Development, for the agency.
Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest that agency improperly rejected the protester's final proposal revision (FPR) as late is denied where the record confirms that the FPR was received by e-mail after the closing time for receipt of FPRs, and agency properly determined that no exception would permit evaluation of the late FPR.

DECISION

Urban Title, LLC, of Dallas, Texas, a small business, protests the award of two contracts to Brendan Gowing Inc. (Gowing) of Houston, Texas, and Luna & Luna, LLP of Garland, Texas, by the Department of Housing and Urban Development (HUD) under request for proposals (RFP) Nos. R-DEN-02218 and R-DEN-02219 for closing agent services. Urban Title argues that its final proposal revision (FPR) was improperly rejected as late, and that the agency improperly used concerns about Urban Title's ongoing performance of the incumbent contract to downgrade its past performance without raising those concerns during discussions.

We deny the protest.

BACKGROUND

HUD issued the RFP on October 11, 2007, seeking proposals to provide real estate closing agent services for single-family properties in certain counties in

Texas.¹ The RFP was set aside for small businesses. After completing the initial evaluation, HUD selected Urban Title and Gowing for award on the basis of their initial proposals and awarded those contracts on March 5, 2008. One of the unsuccessful offerors, Julius L. Thompson, P.C. (Thompson), protested those awards to our Office. Urban Title continued to perform its contract after HUD notified our Office that it would stay the contract awarded to Gowing, but had executed a determination to override the stay of performance of the contract with Urban Title.

Later, HUD announced that it would take corrective action in response to Thompson's protest by conducting discussions with all offerors (including Thompson and the awardees), requesting revised proposals, and making a new source selection decision. Our Office dismissed Thompson's protest on the basis that the corrective action rendered the protest of the awards academic. Julius L. Thompson, P.C., B-311437, May 2, 2008.

Between April 15 and June 30, at least 22 instances of what HUD regards as inadequate performance by Urban Title of the ongoing contract had occurred. However the record does not suggest that Urban Title was aware that its performance was regarded as deficient by HUD at that time.

On June 30, the contracting officer (CO) sent a letter by e-mail to each offeror, providing specific discussions questions. The only issue raised with Urban Title was a request that it move its key personnel resumes to a different section of its proposal. No concerns about Urban Title's performance of the incumbent contract were mentioned.²

¹ Although issued as two separate solicitations, there is no dispute on the record here that there was essentially one competition; each offeror submitted a single proposal, with the expectation HUD would award contracts to two offerors on the same basis. The RFP described the resulting contracts as requirements contracts, and explained that orders would be distributed between the two contractors. For the sake of simplicity, we will refer to the RFP in the singular.

² HUD subsequently issued a cure notice dated September 23, which when combined with Urban Title's response permitted our Office to identify the dates of most of the performance problems. In short, although the record is not exhaustive, we accept the protester's premise that enough performance problems (in HUD's view) had occurred by the time that discussions were opened that HUD could have raised its concerns during discussions. However, we note that it has not been necessary for our Office to consider the merits of the cure notice or Urban Title's response; rather, for purposes of our analysis, we will assume that Urban Title's explanations are valid and would have allayed the evaluators' concerns.

Each of the discussions letters concluded as follows:

You are required to submit your FPR no later than 5:00 PM, MDT [Mountain Daylight Time], on Wednesday, July 9, 2008. . . . Please submit the FPR via email to [contracting specialist's e-mail address]. Any late FPR will be subject to the rules spelled out at FAR [Federal Acquisition Regulation] 52.215-1, Instructions to Offerors--Competitive Acquisition. You may contact [the contracting specialist] or myself at [phone number] if you have any questions.

Protest exh. 1, Letter from CO to Urban Title, at 1-2.

Urban Title submitted its FPR twice by separate e-mails to the address of the contracting specialist on July 9. Urban Title sent the first e-mail at 4:48 p.m. MDT (or 12 minutes before the closing time), and it sent the second e-mail at 5:01 p.m. MDT (or 1 minute after the closing time).

Neither e-mail from Urban Title was received by HUD before the deadline. The contracting specialist received the second of the two e-mails from Urban Title at 5:02 p.m. MDT on July 9 (or 2 minutes late). Declaration of Contracting Specialist at 1. As explained further below, the first e-mail did not arrive until several weeks later.

HUD determined that Urban Title's FPR had been received 2 minutes late, and therefore it could not be evaluated. Nevertheless, HUD decided to reevaluate Urban Title's initial proposal, and to evaluate the timely FPRs from other offerors. In conducting the reevaluation, HUD considered as past performance information the ongoing performance by Urban Title under the original contract. That additional past performance information led HUD to downgrade Urban Title under the past performance factor. On August 21, after completing the evaluation, HUD notified Urban Title that its proposal was not selected, and instead Gowing and Luna & Luna had been selected for award. Letter from Contracting Officer to Urban Title, Aug. 21, 2008, at 1.

At the time that the new awards were announced, the first e-mail from Urban Title still had not arrived. However, later the same evening, the first e-mail from Urban Title (originally sent on July 9 at 4:48 p.m. MDT) finally arrived. Specifically, the Contracting Specialist states that on the morning of August 22 his e-mail inbox contained an e-mail from Urban Title that had arrived at 8:52 p.m. MDT the previous evening (August 21). Declaration of Contracting Specialist at 2 & exh. 3 (screen shot of inbox).

After HUD announced the new awards, Urban Title filed this protest.

DISCUSSION

Urban Title argues that its FPR was not late, and even if the FPR was late, the agency misevaluated the firm's past performance by improperly considering adverse performance information without giving Urban Title an opportunity to address the agency's concerns.

With respect to the first issue, we find that HUD correctly concluded that Urban Title's FPR was late. As explained above, both of Urban Title's attempts to submit its FPR were received after the time specified by the agency for receipt of FPRs. Although Urban Title objects that the agency has provided no explanation of the anomaly that resulted in the apparent delay of the protester's first e-mail for 5 weeks, the protester does not dispute that it occurred, and the contracting specialist has provided the facts in a sworn declaration to our Office.

HUD argues that the only exception for a late proposal revision received by electronic means is found in FAR § 52.215-1(c)(3)(ii)(A), which could only apply if Urban Title's electronic submission had reached the "initial point of entry to the Government infrastructure" by 5 p.m. a day before the due date. HUD points out that Urban Title confirms that its FPR submissions were sent on the due date (not a day early), and thus the exception is unavailable.

Urban Title argues HUD elected to limit offerors to submitting FPRs only by e-mail, and that by doing so, HUD was obliged to ensure that its e-mail system was reasonably reliable. In Urban Title's view, the facts here suggest that HUD failed in meeting that duty.

In our view, the protester's argument is foreclosed by the specific treatment of the issue in FAR § 52.215-1(c)(3)(ii)(A). See Sea Box, Inc., B-291056, Oct. 31, 2002, 2002 CPD ¶ 181 at 3 (other exception necessarily applies only to proposals not delivered by electronic means). Moreover, any objection to HUD's decision to specify that FPRs be submitted by e-mail is an allegation of a patent solicitation defect,³ which is therefore untimely when raised for the first time now, after award.⁴

³ Although the FPR submission instructions were apparently not included as a formal amendment to the RFP, they were provided to each offeror along with its discussions issues, and therefore we conclude that the timeliness standards applicable to solicitation defects apply here.

⁴ Neither are we persuaded by the protester's argument that its FPR should be considered to be a late government-favorable revision to an "otherwise-successful" proposal. Urban Title bases this argument on the fact that it had received an award in the initial round of the competition. As such, Urban Title contends that its FPR merely lowered its prices and made no other substantive changes to the initial proposal. Even if true, we agree with HUD that this exception is unavailable because
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4 C.F.R. § 21.2(a)(1) (2008). Accordingly, Urban Title's protest to the treatment of its FPR as late is denied.

Finally, Urban Title argues that since HUD reevaluated the protester's initial proposal, and in particular, lowered its past performance evaluation based on concerns about the company's ongoing performance, it was improper for HUD to fail to raise its concerns during discussions prior to the request for FPRs. In our view, we cannot see how Urban Title was prejudiced by any errors it claims the agency made.

Specifically, even if HUD had advised Urban Title during discussions of the agency's concerns about Urban Title's ongoing performance, the protester's response would have been submitted in its FPR. Since, as explained above, the protester's FPR was received late and was properly not considered, Urban Title, under the unique circumstances present here, cannot reasonably claim to have been prejudiced by the agency's failure to raise these issues during discussions--although, for the record, we need not, and do not, reach the issue of whether such discussions were required. Instead, we simply note that if they had been provided, they would not have saved Urban Title from its later failure to submit a timely FPR. See, e.g., McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

The protest is denied.

Gary L. Kepplinger
General Counsel

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Urban Title's initial proposal was not "otherwise successful" after the evaluation of FPRs.